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In The

Supreme Court of the United States

October Term, 1995

ZACHARY TATUM, STRATA EXPLORATION, INC., TATUM PETROLEUM OHIO, INC., AND TATUM PETROLEUM CORPORATION,

Petitioners,

vs.

COLUMBIA NATURAL RESOURCES, INC., AND STOCKER & SITLER OIL COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

I. PETITIONERS ARE PREPARED TO PRESENT A THOROUGH AND CREDIBLE "VOID FOR VAGUENESS" CHALLENGE TO RICO'S "PATTERN OF RACKETEERING ACTIVITY" ELEMENT IN THIS CASE.

When the District Court granted petitioners' motion to dismiss respondents' RICO claim, the Court correctly held RICO's "pattern requirement" unconstitutionally vague as applied to petitioners in this case, that is, to the alleged conduct of petitioners as claimed in the amended complaint. The District Court accurately perceived this case, with its allegations of mail fraud, wire fraud and Travel Act fraud, as different from other cases that have held that the RICO statute comports with substantive due process. (Petition for Writ of Certiorari, Appendix B, pp. 21a-23a). Indeed, the petitioners' vagueness challenge to the "pattern of racketeering activity" element of RICO is presented in a factual context that is markedly dissimilar to cases that have preceded it.

For instance, among the cases cited by respondents in their brief in opposition, where vagueness challenges to RICO's pattern element have been rejected, are cases involving factual allegations and circumstances of the type Congress reasonably intended to reach through RICO. *E.g.*, *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995) a criminal case involving a loansharking ring and allegations of extortionate debt collection through threats of physical harm and assaults; *United States v. Korando*, 29 F.3d 1114 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 496 (1994) involving alleged predicate acts of arson and murder; *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995) involving alleged labor union corruption

and bribery of union negotiators through covert union pension payments; *United States v. Sanders*, 962 F.2d 660 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 262 (1992) a criminal case stemming from an FBI sting of police corruption in Chicago, involving allegations of bribery and a police protection racket; *United States v. Van Dorn*, 925 F.2d 1331 (11th Cir. 1991), involving a loansharking operation allegedly operated by members of the "Gambino crime family;" *United States v. Crosby*, 789 F. Supp. 440 (DDC 1992), *aff'd*, 20 F.3d 480, *cert. denied*, 115 S. Ct. 221 (1994) with predicate acts of conspiracy to distribute narcotics; and *United States v. Busacca*, 739 F. Supp. 370 (N.D. Ohio 1990), *aff'd*, 936 F.2d 232 (6th Cir. 1991), *cert. denied*, 502 U.S. 985 (1991) concerning a labor union embezzlement scheme from an employee welfare fund. The other Circuit Court of Appeals cases cited by respondents are otherwise distinguished in the Petition for Writ of Certiorari at pages 21 through 23.

In this case, there are no allegations lodged against the petitioners claiming the commission of any crimes or any conduct of similar magnitude to that at issue in the foregoing cases. In contrast, respondents have only alleged that RICO liability is implicated against petitioners upon predicate acts of mail fraud, wire fraud and Travel Act fraud in connection with otherwise ordinary business and contractual transactions. In their argument that the petitioners' constitutional challenge to RICO's pattern element as applied in this case should not be reviewed by this Honorable Court, respondents rely heavily on the fact that their amended complaint alleged "hundreds of counts of mail fraud, 28 counts of wire fraud and one count of Travel Act fraud." Based primarily upon the number of these alleged predicate "counts," respondents contend that the "pattern" component of 18 U.S.C. § 1962(c) is not void for vagueness as applied to petitioners in this case. However, it has been appropriately observed by the Seventh Circuit Court of Appeals that:

> The predicate acts [here] consisted primarily of hundreds of invoices sent through the mails. . . . Although the sheer number of predicate acts might appear at first glance to prove continuity, when it comes to a pattern premised on acts of mail or wire fraud, the volume of mailings is not dispositive. (citation omitted) Indeed, mail and wire fraud allegations "are unique among predicate acts" because multiplicity of such acts "may be no indication of the requisite continuity of the underlying fraudulent activity." Consequently, *we do "not look favorably on many instances of mail and wire fraud to form a pattern."*

(Emphasis added). *Midwest Grinding Company v. Spitz*, 976 F.2d 1016, 1024-1025 (7th Cir. 1992). *See also, United States Textiles, Inc. v. Anheuser-Busch Companies, Inc.*, 911 F.2d 1261, 1268 (7th Cir. 1990). The *Spitz* court ultimately found the continuity prong of a RICO pattern missing from that case, despite the allegation of "hundreds of" instances of mail fraud.

The *Midwest Grinding v. Spitz* case, *supra*, contrasted against the Court of Appeals' decision in the instant case serves as a glaring example of how there exists conflict and uncertainty between and among the Circuit Courts of Appeals over the application of the so-called "multifactor" approach to determine whether a RICO pattern exists in light of this Supreme Court's decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). In *Spitz*, the court refused to blindly accept the allegation of a "sheer number of predicate acts" of mail and wire fraud as indicative of the type of criminal operation targeted by RICO. In the case at bar, the Court of Appeals seemed to simply be more impressed with the length and volume of respondents'

amended complaint than with the content thereof or the conduct alleged therein. (*See* Petition for Writ of Certiorari, Appendix A, p. 16a). The court in *Spitz* also gave far more significant weight to the factor that only one alleged "victim" existed as militating against a finding of "continuity" than did the Sixth Circuit Court of Appeals in the within action. *Midwest Grinding v. Spitz, supra*, at p. 1025.

In the case of *United States Textiles v. Anheuser-Busch Companies, supra*, the Seventh Circuit Court of Appeals held, again in a post-*H. J.* case, that the factor of a "single victim" was "highly significant" to the question of continuity, even when taken into consideration with other factors, *inter alia*, allegations of an unknown but "considerable number" of alleged acts of mail and wire fraud over the course of a number of years. The Court, applying the "multifactor" approach, held that no pattern "continuity" was present when, in part:

> [W]e note as significant the fact that *[plaintiff] has given no indication that this [mail and wire fraud] is a type of activity in which [defendant] normally engages* or, indeed, that there are other potential [defendant] victims waiting in the wings.

(Emphasis added). *Id.* at p. 1269. In the instant case respondents do not so much as allege that mail and wire fraud is a type of activity in which petitioners "normally engage." Nor are there any allegations of other potential "victims waiting in the wings," aside from what is ostensibly the "single victim" in this case. *See also, Midwest Grinding v. Spitz, supra*, at p. 1023.

The post-*H.J.* multifactor approach to determining whether or not a RICO pattern is adequately alleged and demonstrated leads to the intolerable situation where (by varying the focusing

on and indiscriminately weighting the importance of different factors) what is or would be one circuit's "pattern" may well not be another's. Petitioners respectfully submit that this does not comport with substantive due process inasmuch as it fails to give persons, such as petitioners, fair notice of what conduct subjects one to potential RICO liability, regardless of where that conduct may occur. Moreover, the situation that now exists, post-*H.J.*, reduces the examination and resolution of whether pattern continuity is present to an *ad hoc* and subjective procedure, which squarely runs afoul of substantive due process. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "Laws must provide explicit standards for those who apply them," not multiple factors subject to being arbitrarily, capriciously and inconsistently weighted. *Id.* at p. 108. A constitutionally-acceptable pattern continuity standard must provide notice to legitimate businesspersons of the types and features of conduct that may give rise to potential civil RICO liability *and* help ensure uniform application of the statute throughout the country.

There is in fact conflict and inconsistency among the Circuit Courts of Appeals in their post-*H.J.* utilization of a multifactor approach to determination of pattern continuity. An example of such conflict was expressly commented on in the *United States v. Busacca* case, *supra*:

> *The Third and Fourth Circuits have issued inconsistent opinions with respect to what is sufficient for a finding of continuity.* In *Swistoch v. Jones*, 334 F.2d 755, 759 (3rd Cir. 1989), the court found that predicate acts over a period of more than a year were sufficient to show continuity. In *Menosco v. Wasserman*, 886 F.2d 681 (4th Cir. 1989), the court found that where there was one scheme, two victims, and one perpetrator with acts

> over the course of one year, there was no continuity within the meaning of RICO. *These two contradictory opinions provide this Court with little assistance.*

(Emphasis added). *United States v. Busacca*, 739 F. Supp. at p. 376. The post-*H.J.* "multifactor approach" to pattern continuity will continue to plague civil RICO cases, particularly those premised on mail and wire fraud predicates such as the instant case, with inconsistency and incompatibility. (*See also*, cases cited in Petition for Writ of Certiorari, pp. 23-24).

Strictly following the Seventh Circuit's *Midwest Grinding v. Spitz* decision, *supra*, the conduct alleged against petitioners, even if accepted as true, should not expose petitioners to potential RICO liabilities. The *Spitz* court commented further:

> *Midwest accused the defendant of committing hundreds of acts of mail and wire fraud* in the process of carrying out the alleged diversion scheme.
>
> * * *
>
> Despite the fact that we have yet to confront a civil RICO case that satisfies *H. J., Inc.'s* continuity test, *See supra* at 1024 (citing all post-*H. J., Inc.*, Seventh Circuit cases), *civil RICO plaintiffs persist in trying to fit a square peg in a round whole by squeezing garden-variety business disputes into civil RICO actions.*
>
> * * *

> The widespread abuse of civil RICO extends from the fact that all modern business transactions entail use of the mails or wires — giving plaintiffs a jurisdictional hook — and the fact that RICO offers a far more generous compensation scheme than typically available in state court. [Citations omitted]. *H. J., Inc.* responded to that abuse by *refocusing the pattern requirement on the sort of long-term criminal activity that carries some quantum of threat to society; the evidence here falls short of that mark.* "At its most basic level, *this is a purely private business dispute* between Spitz and Midwest; moreover, *that dispute is occasioned solely by their previously existing business relationship. Congress did not have such a dispute in mind in fashioning the civil treble damage remedy to the federal RICO statute.*" [Citations omitted]. Midwest may very well have a case against Spitz for breach of duty or tortious interference with business relationships; it has absolutely no case against him, however, for a civil RICO violation.

Midwest Grinding v. Spitz, supra at pp. 1025-1026. The federal Circuit Courts of Appeals cannot consistently know when a "pattern of racketeering activity" arises from conduct of alleged mail and wire fraud in business transactions; businessmen and others, such as petitioners, should not be expected to know this. Thus, the RICO "pattern of racketeering activity" element is unconstitutionally vague as applied to petitioners in this case.

In their brief in opposition, the respondents misconstrue

petitioners' third question presented in this appeal as being unrelated to petitioners' void for vagueness challenge. Petitioners view their third question presented as a logical extension of or corollary to petitioners' first and second questions. (*See* Petition for Writ of Certiorari at p. 25). After all, the focus of RICO is not on predicates only — their number, continuity or relationship *inter se* — but on their relationship to the "affairs" of an enterprise.

Furthermore, petitioners' third question is now ripe for consideration in this case in light of the Court of Appeal's decision holding that respondents' amended complaint states a RICO § 1962(c) claim. Prior to that, the District Court had dismissed the amended complaint finding the RICO "pattern" element void for vagueness as applied to petitioners. In any event, to the extent question three is a "new" argument in this case, this is not *per se* preclusive of the Supreme Court's review of this question in this case if certiorari is granted. *E.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980); and *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

In response to petitioners' third question, respondents do not dispute the petitioners' synopsis of the facts alleged in the amended complaint which only allege acts of mail, wire and Travel Act fraud reportedly to advance the petitioners' own individual or business interests. Allegations of this type do not provide any meaningful differentiation between the alleged RICO enterprise and the parties said to comprise it. If, as the court held in the case of *Richmond v. Nationwide Cassel L.P.*, 847 F. Supp. 88 (N.D. Ill. 1994), *aff'd*, 52 F.3d 640 (7th Cir. 1995), § 1962(c) "liability depends on showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs," then the Sixth Circuit Court of Appeals incorrectly held that the respondents' amended complaint stated a claim.

Contrary to respondents' suggestion, petitioners' third question is not answered by this Honorable Court's previous decision in *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette, supra*, this Court only addressed whether or not an "enterprise," for purposes of RICO, could encompass both legitimate and illegitimate enterprises. The court answered that question in the affirmative. Petitioners believe their third question is ripe for review and should, similarly, be answered in the affirmative to hold that RICO's § 1962(c) "pattern" element requires that an enterprise's (be it legitimate or illegitimate) affairs be conducted or directed through racketeering activity rather than the conduct of a defendant's own business or affairs. *See also, Reves v. Ernst & Young*, 507 U.S. __, 113 S. Ct. 1163, 122 L. Ed. 2d 525, 540 (1993).

II. PRINCIPLES GOVERNING REVIEW ON CERTIORARI ARE SATISFIED IN THIS CASE.

Petitioners respectfully submit that review of this case by this Honorable Court, on certiorari, is warranted under the general principles governing review on certiorari. Petitioners maintain that the Court of Appeals below, in ruling that RICO was not unconstitutionally vague as applied to petitioners, decided an important question of federal statutory and constitutional law that should be settled by this Court. Furthermore, petitioners believe certiorari is also appropriate in light of the demonstrable inconsistency among the Circuit Courts of Appeals that has developed in the *ad hoc* application of the "multifactor" approach to pattern continuity, which is supportive of petitioners' void for vagueness challenge herein.

It is time to seriously address the vagueness of the RICO statute and its pattern element. It is time to seriously evaluate (as a matter of substantive due process) a statute that leaves the Courts and businesspersons "lost in a land with few signposts"

when determining its scope; a statute being "used for extortive purposes, giving rise to the very evils that it was designed to combat." *See Tabas v. Tabas*, 47 F.2d 1280 (3rd Cir. 1995); and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985), Marshall J., dissenting. This case has the complete record and appropriate context in which to now address these important issues and concerns.

CONCLUSION

WHEREFORE, petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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